CORRECTED COPY

Office-Supreme Court, U.S.
FILED
JAN 2 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 738

CASCADE COUNTY CONSUMERS ASSOCIATION, ET AL., *Petitioners*,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, ET AL., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR RESPONDENTS IN OPPOSITION

FRANCIS M. SHEA,
WILLIAM H. DEMPSEY, JR.,
734 Fifteenth Street, N.W.,
Washington, D.C.,
Attorneys for all Respondents.

Of Counsel:

SHEA & GARDNER,
734 Fifteenth Street, N.W.,
Washington, D.C.

WILLIAM E. O'LEARY,
Public Service Commission,
State Capitol Building,
Helena, Montana.

ROBERT D. CORETTE,
WILLIAM H. COLDIRON,
The Montana Power Company,
40 E. Broadway,
Butte, Montana.

WILLIAM P. MUFICH,
Public Service Commission,
State Capitol Building,
Helena, Montana,
Attorney for Respondents the Public Service Commission of Montana and its members.

S. B. CHASE, JR.,
JOHN J. BURKE, JR.,
The Montana Power Company,
40 E. Broadway,
Butte, Montana,
Attorneys for Respondent The Montana Power Company.

INDEX

	Page
Opinions Below	1
Questions Presented	2
Statutes Involved	3
Statement	3
1. *The October 4 Meeting*	4
2. *The Closing Audit*	7
3. *The Rate Base*	8
Argument	9
Appendix	i
Commission Orders	i
Applicable State Statutes	viii

CITATIONS

Cases:

Columbus Gas & Fuel Company v. *Public Utilities Comm'n of Ohio*, 292 U.S. 398 (1934)	13
Consolidated Edison Co. of New York, Inc. v. *N.L.R.B.*, 305 U.S. 197 (1938)	11
Davidson v. *New Orleans*, 96 U.S. 97 (1877)	12
Hetrick v. *Village of Lindsey*, 265 U.S. 384 (1924)	12
Market Street Railway Co. v. *Railroad Comm'n of California*, 324 U.S. 548 (1945)	9, 11
Mount St. Mary's Cemetery v. *Mullins*, 248 U.S. 501 (1919)	12
Ohio Bell Telephone Company v. *Public Utilities Comm'n*, 301 U.S. 292 (1937)	10, 11
Opp Cotton Mills v. *Administrator*, 312 U.S. 126 (1941)	11
United States v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946)	10, 11

Statutes:

4 Rev. Codes Mont. 1947, § 70-106	9
4 Rev. Codes Mont. 1947, § 70-128	3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 738

CASCADE COUNTY CONSUMERS ASSOCIATION; MONTANA CONSUMER ASSOCIATION; MONTANA STATE FLORISTS ASSOCIATION; RALPH PARKER, AN INDIVIDUAL; ARTHUR SMITH, AN INDIVIDUAL; AND LLOYD C. WENNER, AN INDIVIDUAL, *Petitioners*,

v.

PUBLIC SERVICE COMMISSION OF MONTANA; PAUL T. SMITH, JACK HOLMES AND LOUIS G. BOEDECKER, AS MEMBERS THEREOF AND CONSTITUTING SAID PUBLIC SERVICE COMMISSION OF MONTANA; AND THE MONTANA POWER COMPANY, A CORPORATION, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

Petitioners fail to print the opinion of the Montana Public Service Commission (Order No. 2897) and state that it is unreported. The Commission opinion is reported in

Volume 42, Public Utilities Reports, Third Series, at page 241. An extensive quotation therefrom appears in the Montana Supreme Court decision in Appendix I to Petition at pages 55-64.

Petitioners do not mention an important supplemental order (No. 2897-B) issued by the Commission in this case. In that order, the Commission affirmed its initial decision after reconsideration of additional evidence that was presented in the District Court. This order, as well as another supplemental order (No. 2897-A) in which the Commission denied petitioners' petition for rehearing, are set forth in the Appendix to this Brief in Opposition at pages i-vii.

Questions Presented

1. Whether parties opposing a gas rate increase requested by a gas company are deprived of property without due process of law because of an *ex parte* discussion between representatives of the State Public Service Commission and representatives of the company where, under applicable State law, those parties were thereafter afforded a hearing in State District Court at which they had unlimited opportunity to ascertain what had occurred at the meeting, where they did not take advantage of that opportunity and did not establish that they had been prejudiced in any way, and where under applicable State law the State District Court was required to and did remand the case to the Public Service Commission for reconsideration in light of any evidence introduced at the District Court hearing.

2. Whether parties opposing a gas rate increase requested by a gas company are deprived of property without due process of law because of alleged reliance by the Public Service Commission upon information gathered through an independent audit by Commission representatives of the company's records where the same District

Court hearing and remand procedures described in the preceding question were followed, where again the parties failed to establish prejudice, and where in addition the audit was made at the request of those parties.

3. Whether parties opposing a gas rate increase requested by a gas company are deprived of due process of law by virtue of the alleged inclusion in the rate base of property not "used and useful," where the Public Service Commission found that all property included in the rate base was in fact "used and useful," where such a finding was required by applicable State law, and where the State Supreme Court held that the Commission's finding was supported by the record.

Statutes Involved

The petition is defective in not including various of the Montana statutory provisions governing the action of the Montana Public Service Commission in rate proceedings. For the convenience of the Court, respondents have reproduced a number of these provisions in the Appendix to this Brief in Opposition at pages vii-xii. Particularly important is the section establishing the procedure for reviewing rate orders of the Commission, 4 Rev. Codes Mont. 1947, § 70-128.

Statement

The Public Service Commission of Montana (hereinafter sometimes referred to as the "Commission"), the individual members thereof, and The Montana Power Company (hereinafter sometimes referred to as the "Company") have joined in this response. Throughout this Brief in Opposition all of these parties will be referred to jointly as respondents unless separate designation is necessary.

Since petitioners' statement of the case omits for the

most part the facts regarded as controlling by the Supreme Court of Montana, respondents feel obliged to restate in full the nature of this case.

At issue is a gas rate order that was entered by the Public Service Commission after the most exhaustive consideration. As the Montana Supreme Court observed, some 2900 pages of testimony were taken, and "[t]he entire fiscal, production, transmission and policy operations [of the Company] were explored by all interested parties at the Board hearings" (Pet. App. I, p. 24). The result was the approval by the Commission of a rate increase. Petitioners seek review on three grounds of the judgment of the Montana Supreme Court sustaining this Commission order.

1. *The October 4 Meeting.* The first ground relates to a discussion between two members of the Commission and four representatives of the Company on October 4, 1961, shortly after the close of the hearing. On October 27, 1961, petitioners filed a motion asking the Commission to reopen the proceedings because of that meeting. On February 2, 1962, in the same order that established the Company's rates, the Commission denied petitioners' motion (Tr. App. A, pp. 14-17).[1]

For present purposes, the most critical events occurred during the State District Court proceedings upon petitioners' complaint seeking to set aside the Commission's order. Under the relevant statutory provision, 4 Rev. Codes Mont. 1947, § 70-128 (App. p. x, *infra*), the party contesting the Commission's order may introduce before the District Court additional evidence, and if that is done the

---

[1] In this brief, we shall refer to the transcript of the court hearings as "Tr." and to the Commission hearing transcript as "P.S.C. Vol. —, p. —."

District Court is required to remand the case to the Commission for reconsideration.

In the case at bar, one of the issues raised in the District Court by petitioners related to the October 4 conference (Pet. App. I, p. 44). At the pre-trial conference petitioners stated that they expected to call as witnesses all of the members of the Commission and the four Company representatives who had attended the conference (Tr. pp. 43, 44). In consequence, when the matter came on for trial everyone who had been present at the conference was in the courtroom prepared to testify (Pet. App. I, p. 45).

Despite this opportunity to establish that they had been prejudiced by the October 4 meeting, petitioners' efforts were, to put it conservatively, desultory. Indeed, the task of establishing the facts respecting the meeting fell by default to the Company's attorneys, as is made plain in the Supreme Court's opinion (Pet. App. I, pp. 45-47).

Thus, while Commissioner Smith stated on direct examination by petitioners' counsel that the meeting had been called at the initiative of the Commission because he and another Commissioner wanted clarification respecting a certain question, counsel did not even ask what that question was (Tr. 103). It was not until cross-examination, as the Supreme Court observed, that any details of the meeting emerged (Pet. App. I, p. 46). In response to interrogation by the Company's attorney, Commissioner Smith stated that the discussion at the meeting had related to "some questions about the income tax as it applied in Canada and in the United States" and that his decision would have been the same if there had not been any meeting (Tr. 119, 122; Sup. Ct. Op., Pet. App. I, p. 46). There was no redirect examination.

The few broad questions asked of Commissioner Smith

ended petitioners' inquiry respecting the October 4 meeting. Petitioners' attorneys interrogated Commissioner Boedecker and the Company's treasurer, Mr. Harrington, about other matters, but did not ask them a single question concerning the meeting. Nor did petitioners call any of the other participants in the meeting.

The Company's counsel, however, noting that petitioners' counsel had not dealt with this issue when Boedecker and Harrington were on the stand, recalled them and explored the matter (Tr. 133, 157, 187, 190). Both testified that the discussion had concerned differences between the tax structure of Canada and the United States; Harrington restated in detail what he had told the Commissioners as to why a suggested change in tax treatment of certain properties of the Company would result in no benefit whatever to the Company's customers; and Boedecker stated that the meeting did not change his decision (Tr. 187, 188, 192; see Supreme Court discussion at Pet. App. I, pp. 46-47).

With this additional evidence introduced, the District Court remanded the case to the Commission for its reconsideration in accord with the statutory provisions described above. The Commission, having "carefully reviewed and considered" the testimony, reaffirmed its rate order (App. pp. i-iii).

While upon subsequent review the District Court reversed the Commission, in part because of the October 4 meeting (Pet. App. II, pp. 104-112), the Supreme Court disagreed. Notwithstanding its view that the Commission should abstain from this type of *ex parte* meeting (Pet. App. I, pp. 39-44), the Court held that there had been no deprivation of due process in view of the opportunity

accorded petitioners in the District Court hearing to establish prejudice and their failure to do so (*id.*, at p. 47).[2]

2. *The Closing Audit.* The second issue raised by petitioners relates to an audit and investigation performed by Commission representatives after the hearings. This audit was made, as the Supreme Court pointed out, in response to a motion by petitioners (Pet. App. I, p. 30; PSC Vol. XXXI, p. 2921). No motion for reopening on account of this audit was made to the Commission by petitioners; but at the District Court hearing petitioners claimed that the audit had deprived them of due process.

Again, evidence was taken in the District Court respecting this question. Commissioner Smith testified that the Commission had directed its auditor and its attorney to examine the Company's books; that the auditor and attorney reported to the Commission that the facts introduced by the Company were verified by the audit; that all adjustments by the Commission of Company figures were based upon data presented at the hearings; and that petitioners' counsel would have to ask the auditor, Mr. Johnson, for more particular information (Tr. 105, 109, 116, 117).

Commissioner Boedecker testified that the audit had been made pursuant to petitioners' motion; that the audit had included a study of oil and gas leases; and that the auditor, Mr. Johnson, would be best qualified to testify

---

[2] Actually two District Court suits were instituted attacking the Commission order, one by petitioners in Cascade County and another by other protestants in Blaine County. The Blaine County suit ended in a judgment affirming the Commission's decision, and no appeal was taken (Pet. App. I, p. 34). It may be noted that, as the Supreme Court observed, the parties in the Blaine County action stipulated that the court could consider the evidence that had been introduced in the Cascade County suit (*ibid.*).

respecting the records kept of the audit (Tr. 134, 135, 138, 155).

Petitioners introduced no evidence countering this testimony, nor did they call either Mr. Johnson, the Commission's auditor, or Mr. Mufich, its attorney, to testify respecting the audit, although both were in the courtroom pursuant to the District Court's pre-trial order (Pet. App. I, pp. 45, 53).

This additional evidence was considered by the Commission on remand from the District Court together with the evidence relating to the October 4 meeting. As we have noted, the Commission reaffirmed its order; the District Court reversed; but the Supreme Court sustained the Commission. As to this particular issue, the Supreme Court rested its decision upon a number of considerations, including the following: (1) The audit had been requested by petitioners. (2) Petitioners had failed to take advantage of the opportunity given them during the District Court trial to elicit testimony respecting the audit. (3) The Commission had given petitioners ample opportunity during the hearing to examine the Company's books. And (4) "[a] careful examination of this voluminous record fails to substantiate . . . that concerning the post-hearing audits by Commission employees, that the Commission based its judgment upon evidence or information not in the record." (Pet. App. I, pp. 45, 50-53).

3. *The Rate Base.* The final question raised by petitioners is whether they have been deprived of due process because the Commission included in the Company's rate base property not "used and useful." It does not seem necessary to relate the extensive evidence respecting this issue that was considered by the Commission. We are content to rest upon the indisputable facts that State law requires that only property "used and useful" be included

in the rate base (4 Rev. Codes Mont. 1947, § 70-106; Pet. App. I, p. 64); that the Commission applied this standard in this case (Tr. App. A, p. 57; Pet. App. I, pp. 65, 67); and that the Supreme Court held that the Commission had given "very careful attention . . . to the problem of rate base," that it had "determined just what gas leaseholds and gas reserves were used and useful as required by our statute," that "complete, detailed information in the form of testimony and exhibits was introduced," and that "[c]ertainly . . . the Commission could, as it did, exercise its discretion in placing its valuation on gas reserves that are actually used and useful for the convenience of the public" (Pet. App. I, pp. 64-65).

Argument

The grounds put forward by petitioners are wholly insufficient to warrant the grant of *certiorari* both because the decision below accords with prior decisions of this Court and also because that decision has no significance beyond this single case. We discuss in turn the three issues raised by petitioners.

1. The decision below that the Commission's order could not be impeached on the the basis of the October 4 meeting was entirely sound. As this Court has held, in a case like the one at bar there is no violation of the Due Process Clause of the Fourteenth Amendment where the complaining party has not been prejudiced by the acts in question. To put it differently, the asserted want of due process must have resulted in a "deprivation of property" before relief can be had.

Thus, in *Market Street Railway Co.* v. *Railroad Comm'n of California*, 324 U.S. 548, 562 (1945), where the complaint was directed against the action of the State Commission in having based its decision in part upon reports filed with

it after the close of the hearing, this Court held that there had not been a violation of the Fourteenth Amendment because there had been no prejudice. And again, in *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 530 (1946), in similar circumstances this Court held that "the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result."

It was this principle that the Supreme Court of Montana applied in disposing of petitioners' contention, as we have noted. See *supra*, pp. 6-7. Petitioners were given an unlimited opportunity at the District Court trial to establish that they had been damaged by the October 4 meeting, but they did not even attempt to show that the meeting had any bearing whatever on the outcome of the case or that Mr. Harrington's testimony in the District Court respecting the matter of Canadian and United States tax law was in any degree inaccurate. Certainly the hearing in the District Court with the subsequent remand to the Commission fully met the requirements of the Due Process Clause. That petitioners made no effort to establish prejudice simply underscores the inconsequential character of the October 4 discussion.

These circumstances wholly distinguish the decision so heavily relied upon by petitioners, *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n*, 301 U.S. 292 (1937). There, as the Court observed, "the sole method of review [was] by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence." Thus, the Court stressed that "under the statutes of Ohio no provision is made for a review of the order of the Commission by a separate or independent suit" and that a different question would be presented if such a suit could be maintained.

Id., at 303. In the case at bar it is the principle of cases like *Market Street Railway Co.* and *Pierce Auto Freight Lines* that is controlling, not *Ohio Bell Telephone.*[3]

The petitioners' suggestion (Pet. p. 16) that the District Court trial was not adequate because there had been no record of the October 4 meeting, because the ten months' lapse of time "would dull the witnesses' memory," and because the "decision-making process of the Commission [was] complete[d]" is without substance. First, as we have pointed out, under the State statute the decision-making process of the Commission had not ended, but rather the case was reconsidered by the Commission on the basis of the evidence introduced at the District Court hearing. Second, there was no showing whatever that the witnesses' recollection might have been faulty. And finally the petitioners' argument would apply to any remand procedure designed to permit the introduction of new evidence by a party, whereas it is of course incontrovertible that such a procedure is the appropriate remedy in many situations. See, *e.g.*, *Consolidated Edison Co. of New York, Inc.* v. *N.L.R.B.*, 305 U.S. 197, 225-226 (1938), where the Court held that a trial examiner's "arbitrary" refusal to receive certain "highly important" testimony did not result in a deprivation of due process because on appeal from the Board's final decision the petitioners could have secured a court order directing that the evidence be taken. Having failed to avail themselves of this remedy, petitioners could not complain. See also *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126 (1941), where, in rejecting a claim that petitioner had been entitled to a hearing before a committee estab-

---

[3] We may note also that extensive research has not disclosed a single court decision involving a statute comparable to 4 Rev. Codes Mont. 1947, § 70-128.

lished to advise the Wage and Hour Administrator respecting minimum wages, the Court stated:

> "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. The proceedings [including a hearing] before the Administrator as provided by § 8(d) satisfy the requirements of due process without further requirement, which the statute omits, of a hearing on notice before the Committee." *Id.*, at 152-153.

See also *Davidson* v. *New Orleans*, 96 U.S. 97, 105 (1877); *Hetrick* v. *Village of Lindsey*, 265 U.S. 384, 387 (1924); *Mount St. Mary's Cemetery* v. *Mullins*, 248 U.S. 501, 506 (1919).

It may finally be noted that the Montana Supreme Court did not stop with its finding that petitioners had in no way been prejudiced by the meeting of October 4. It went on to condemn such *ex parte* meetings as a norm of future conduct. It is, accordingly, unlikely that a case like the one at bar will arise again. We have, then, an entirely correct ruling that the petitioners were in no way prejudiced, along with a sound proscription of such informal practice in the future. It is evident, therefore, that this decision presents no issue of general or continuing significance and does not deserve further review by this Court.

2. The second contention urged by petitioners—that they were deprived of due process by virtue of the independent audit conducted by the Commission—falls on the same grounds discussed above. Again, the petitioners had every opportunity to explore this matter at the District Court trial, but they failed to establish that they had been dam-

aged in any respect by the audit. In fact, as the Montana Supreme Court stressed (Pet. App. I, pp. 45, 53), they did not even call as witnesses the two Commission representatives who conducted the audit, although they were at the hearing prepared to testify. In such circumstances, surely there is no constitutional infirmity in the judgment below.

Indeed, as to this question petitioners expressly disavow any contention that the Commission had no right to conduct the audit (Pet. p. 17). They hardly could take a different position, since the audit was made in response to their motion. Rather, again they contend that the District Court hearing ten months after the audit took place did not provide them with a sufficient opportunity to explore the matter. For the reasons stated above in connection with a similar contention respecting the October 4 meeting, this argument is without force. The notion that only a hearing at the time of the audit could afford petitioners due process simply has no foundation either in common sense, in any decisions that we have discovered, or in any that petitioners have cited.

3. Finally, petitioners maintain that they were deprived of due process because the Commission included property "not used and useful" in the Company's rate base. The short answer is that, as we have indicated (*supra*, p. 9), the Commission held that all the property included in the rate base *was* used and useful within the meaning of the state statute and this finding was affirmed by the Montana Supreme Court. Thus petitioners are urging this Court to sit as a third court of review respecting findings of fact by a state regulatory commission.[4] We respectfully sug-

---

[4] In such circumstances, the decision relied upon by petitioners, *Columbus Gas & Fuel Company* v. *Public Utilities Comm'n of Ohio*, 292 U.S. 398 (1934), plainly gives them no support. Indeed, to the extent that decision is relevant, it supports the judgment below. As the Court ob-

gest that, as a basis for granting *certiorari*, this request is frivolous.[5]

Respectfully submitted,

FRANCIS M. SHEA,
WILLIAM H. DEMPSEY, JR.,
734 Fifteenth Street, N.W.,
Washington, D.C.,
Attorneys for all Respondents.

Of Counsel:

SHEA & GARDNER,
734 Fifteenth Street, N.W.,
Washington, D.C.

WILLIAM E. O'LEARY,
Public Service Commission,
State Capitol Building,
Helena, Montana.

ROBERT D. CORETTE,
WILLIAM H. COLDIRON,
The Montana Power Company,
40 E. Broadway,
Butte, Montana.

WILLIAM P. MUFICH,
Public Service Commission,
State Capitol Building,
Helena, Montana,
Attorney for Respondents the Public Service Commission of Montana and its members.

S. B. CHASE, JR.,
JOHN J. BURKE, JR.,
The Montana Power Company,
40 E. Broadway,
Butte, Montana,
Attorneys for Respondent The Montana Power Company.

---

served in *Columbus Gas*, the question of what property to include in a rate base "within the margin of a fair discretion must be determined for every producer by the triers of the facts in the light of all the circumstances." *Id.*, at 406. That is precisely what the Commission did in the case at bar, with, as the Supreme Court of Montana held, ample support in the evidence (Pet. App. I, p. 67).

[5] To the extent that petitioners relate this argument to the contention respecting the alleged reliance by the Commission on data secured through the independent audit, the argument is, of course, dealt with in the preceding section of this Brief in Opposition.

APPENDIX

BEFORE THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, EX-OFFICIO PUBLIC SERVICE COMMISSION

* * * * * * *

DOCKET NO. 4997

SUPPLEMENTAL ORDER NO. 2897-B

IN THE MATTER of the application of the Montana Power Company for authority to adopt new rates and charges for natural gas service.

* * * * * * *

Affirming Order No. 2897 and Order No. 2897-A

* * * * * * *

On February 2, 1962, the Commission issued Order No. 2897 and thereafter Order No. 2897-A in Docket No. 4997, wherein the Commission authorized The Montana Power Company to increase its rates and charges for natural gas service in Montana. Thereafter, on or about April 27, 1962, Cascade County Consumers Association, Montana Consumers Association, Montana State Florists Association, Ralph Parker, an individual, Arthur Smith, an individual, and Lloyd C. Werner, an individual, appealed Order No. 2897 to the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, under the provisions of Section 70-128, R.C.M. 1947.

The cause came on for trial before the Court on August 15, 1962, at which time Paul T. Smith, J. J. Harrington, Louis G. Boedecker, and L. S. Stadler were called as witnesses and testified. The trial was then recessed until September 5, 1962, at which time J. J. Harrington was called as a witness and gave additional testimony. In addition to the testimony presented, exhibits were received by the Court during the trial. After the testimony was closed, oral argument was presented and the Court, by its Order

dated September 6, 1962, ordered that the testimony of the proceedings before it be transcribed, that the case be remanded to the Commission with the evidence presented to the Court, and that the Commission report its action thereon to the Court within ten days after the receipt of such evidence. The evidence presented to the District Court of Cascade County in Cause No. 55117B on August 15, 1962 and September 5, 1962, including the exhibits, was received from the Clerk of the District Court on October 2, 1962.

The Commission has carefully reviewed and considered the evidence presented to the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, on August 15, 1962 and on September 5, 1962, and as such evidence relates to the evidence presented before the Commission in Docket No. 4997, as remanded to the Commission by the Court in Cause No. 55117B, and the Commission finds that its Order No. 2897 and Order No. 2897-A in Docket No. 4997, should be affirmed in all respects.

Now Therefore, at a session of the Board of Railroad Commissioners of the State of Montana, Ex-Officio Public Service Commission, held in its office in the Capitol, Helena, Montana, on October 10, 1962, there being present Chairman Jack Holmes, Commissioner Paul T. Smith and Commissioner Louis G. Boedecker, there came on regularly before the Commission for final action, the review and consideration of the evidence presented to the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in Cause No. 55117B, in accordance with said Court's Order under Section 70-128, Revised Codes of Montana, 1947, remanding such evidence to the Commission on October 2, 1962, and the Commission being fully advised in the premises;

It Is Ordered that the Commission's Order No. 2897 and Order No. 2897-A, dated February 2, 1962 and February 23, 1962, respectively, are hereby ratified and affirmed, and

It Is Further Ordered that a full, true and correct duplicate original of this Supplemental Order No. 2897-B be sent forthwith to the Clerk of the District Court of the State of Montana, in and for the County of Cascade, and

that this Supplemental Order shall be considered a report to the Court of the actions and findings of this Commission.

DONE in open session at Helena, Montana, this 10th day of October, 1962.

/s/ JACK HOLMES,
Chairman.

/s/ PAUL T. SMITH,
Commissioner.

/s/ LOUIS G. BOEDECKER,
Commissioner.

ATTEST:

/s/ CATHERINE DUBOIS,
Secretary

Filed October 11, 1962.

* * * * * * *

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MONTANA

* * * * * * *

DOCKET NO. 4997

ORDER NO. 2897-A

IN THE MATTER of the application of THE MONTANA POWER COMPANY for authority to adopt new rates and charges for natural gas service.

* * * * * * *

BE IT REMEMBERED, that the Commission on February 2, 1962, made and entered Order No. 2897 in the above-entitled Docket. On February 13, 1962, the Great Falls Gas Company, one of the protestants herein, filed with the Commission a MOTION TO RECONSIDER AND APPLICATION FOR REOPENING OF HEARING. On February 14, 1962, the Administrator of General Services, on behalf of the United States Government, filed a PETITION FOR LATE FILING AND MOTION TO RECONCIDER AND IN THE ALTERNATIVE APPLICATION FOR REOPENING OF HEARING. On February 16, 1962, the protestants, Montana Consumers Association, Hi-Line Consumers Association, Lewis and Clark County Consumers Association, Cascade County Consumers Association, Montana Florist Association, Elliston Lime Company and C. W. Leaphart, Jr. as an individual, filed a PETITION FOR REHEARING.

The Commission would like to point out that the PETITION FOR REHEARING filed by the Montana Consumers Association, et al, and the MOTION FOR RECONSIDERATION AND IN THE ALTERNATIVE APPLICATION FOR REOPENING OF HEARING filed by the Administrator of General Services were not filed within the time required by the rules and regulations of the Commission. However, because of the serious nature of this proceeding, the Commission accepts the filing of these documents and will pass on the merits of the issues raised therein.

The Great Falls Gas Company in its motion and application raised certain questions as to the form of rate sched-

ule provided for in Order No. 2897 for the sale of gas by The Montana Power Company to the Great Falls Gas Company and to certain provisions therein contained. The General Services Administrator in his motion and application raised substantially the same questions as to the form of the rate schedule provided for the Great Falls Gas Company as were raised by the Great Falls Gas Company in its motion and application. The PETITION FOR REHEARING filed by Montana Consumers Association raises certain questions as to the rate schedules provided for general customers of the applicant Montana Power Company, to evidence which the Commission allegedly did not consider in connection with Order No. 2897 and to certain rulings made by the Commission during the course of the hearings held in the above-entitled Docket.

The Commission has carefully considered each of the issues raised by the motions, applications and petitions filed by the Great Falls Gas Company, the Administrator of General Services and the Montana Consumers Association. These issues have been considered in the light of all of the evidence introduced by all of the parties in the above-mentioned Docket and further consideration of the briefs filed by the various parties of this Docket.

After such consideration of these issues and reconsideration of all of the evidence introduced in the above-entitled Docket and of the briefs filed by the various parties herein, the Commission has determined that the rate schedule for the Great Falls Gas Company provided on Pages 64 and 65 of Order No. 2897 should be modified and amended as hereinafter provided.

IT IS HEREBY ORDERED that the following language appearing on pages 64 and 65 of said Order, namely

"First 10 days' use of monthly Maximum demand	@	$ .50 per MCF
Next 100,000 MCF per month	@	.45 per MCF
Next 100,000 MCF per month	@	.33 per MCF
All additional gas per month	@	.31 per MCF

The Seller shall not be required to furnish gas to the Buyer for service to any new customer or for new or additional service to an existing customer, which will use or require gas in excess of 5,000 MCF per month unless Seller shall agree in writing to furnish gas for such service."

be stricken and there shall be substituted therefor the following language:

"Monthly demand charge—$2.50 per month per customer served by Great Falls Gas Company

Monthly commodity charge—$0.33 per MCF

A customer is defined as an account where a minimum or larger bill is due for service during the previous month but does not include locked off meters even though physically connected to distribution mains.

The Seller shall not be required to furnish gas to the Buyer for service to any new customer or for new or additional service to an existing customer, which will use or require gas in excess of 5,000 MCF per month unless Buyer has secured prior written approval for such service from the Montana Public Service Commission."

The Commission has determined that the rate schedule set forth above will produce the same amount of revenue for The Montana Power Company as would have been produced by the rate schedule originally provided in Order No. 2897. Only the form of the rate schedule has been modified.

IT IS FURTHER ORDERED that the above rate schedule shall apply on all gas delivered by The Montana Power Company to the Great Falls Gas Company on or after March 1, 1962.

After considering all of the motions, applications and petitions aforesaid and after reconsidering all of the evidence introduced by all parties at the hearings held in this Docket and the briefs of the parties heretofore filed herein, the Commission reaffirms all that is stated, provided and ordered in Order No. 2897, except the rate

schedule for the Great Falls Gas Company which is modified as hereinabove provided.

IT IS FURTHER ORDERED that the motions, applications and petitions filed herein by the Great Falls Gas Company, the General Services Administrator and Montana Consumers Association, et al, be, and the same are hereby denied, except as herein provided.

IT IS FURTHER ORDERED that a full, true and correct copy of this Order be sent forthwith by first-class United States mail to the applicant and all appearances in the above-entitled Docket.

The foregoing Order was unanimously adopted by the Public Service Commission of the State of Montana.

DONE in open session at Helena, Montana this 23rd day of February, 1962.

JACK HOLMES,
Chairman.

PAUL T. SMITH,
Commissioner.

LOUIS G. BOEDECKER,
Commissioner.

ATTEST:

CATHERINE DUBOIS,
Secretary

(Official Seal.)

REVISED CODES OF MONTANA, 1947

70-102. *Railroad commissioners as ex officio commission.* The board of railroad commissioners of the state of Montana shall be ex officio the public service commission hereby created, and for the purposes of this act shall be known and styled "Public Service Commission of Montana." It shall provide itself with a seal bearing these words, by which its official acts shall be authenticated in all cases where a seal is required; and in the name as above set forth, it may sue and be sued in the courts of the state and of the United States. The secretary of the railroad commission of Montana shall act as secretary of the commission hereby created, but the business of the public service commission shall be kept entirely separate from that of the railroad commission.

70-104. *Power to prescribe rules of procedure—judicial power.* In addition to the modes of procedure hereinafter prescribed in particular cases and classes of cases, said commission shall have power to prescribe rules of procedure, and to do all things necessary and convenient in the exercise of the powers by this act conferred upon the commission: provided, that nothing in this act shall be construed as vesting judicial powers on said commission, or as denying to any person, firm, association, corporation, municipality, county, town, or village the right to test, in a court of competent jurisdiction, the legality or reasonableness of any fixed order made by the commission in the exercise of its duties or powers.

70-106. *Power of commission to ascertain property values.* The Commission may, in its discretion, investigate and ascertain the value of the property of every public utility actually used and useful for the convenience of the public. In making such investigation the commission may avail itself of all information contained in the assessment rolls of various counties, and the public records of the various branches of the state government, or any other informa-

tion obtainable, and the commission may at any time of its own initiative make a revaluation of such property.

70-109. *Right to examine books, records, etc.* Any commissioner, or any person or persons authorized by the commission, shall have the right to examine the books, accounts, records, and papers of any public utility for the purposes of determining their correctness, and whether they are being kept in accordance with the rules and system prescribed by the commission.

70-116. *Rules as to inspections—public hearings.* The commission shall have the power to adopt reasonable and proper rules and regulations relative to all inspections, tests, audits, and investigations, and to adopt and publish reasonable and proper rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings of public utilities, and other parties before it. All hearings shall be open to the public.

70-117. *Inquiry into and investigation of management of all public utilities.* The commission shall have authority to inquire into the management of the business of all public utilities, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from any public utility all necessary information to enable the commission to perform its duties. The commission or any commissioner, or any person or persons employed by the commission for that purpose, shall, upon demand, have the right to inspect the books, accounts, papers, records, and memoranda of any public utility, and to examine, under oath, any officer, agent, or employee of such public utility in relation to its business and affairs.

Any person, other than one of said commissioners, who shall make such demand, shall produce his authority to make such inspection.

The commission may require, by order or subpoena, to be served on any public utility, in the same manner that a summons is served in a civil action in the district court,

the production, within this state, at such time and place as it may designate, of any books, accounts, papers, or records kept by such public utility in any office or place without the state of Montana, or verified copies in lieu thereof, if the commission shall so order, in order that an examination thereof may be made by the commission, or under its direction.

Any public utility failing or refusing to comply with any such order or subpoena, shall be subject to the liability named in section 70-110.

70-127. *Enforcement of rates or charges.* All rates, fares, charges, classifications, and joint rates fixed by the commission shall be enforced, and shall be prima-facie lawful, from the date of the order until changed or modified by the commission, or in pursuance of the next section. All regulations, practices, and service, prescribed by the commission, shall be enforced and action shall be brought for that purpose, pursuant to the provisions of the next section, or until changed or modified by the commission itself upon satisfactory showing made.

70-128. *Action to set aside rates or charges fixed by commission*

(1) Any party in interest being dissatisfied with an order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services may within ninety days commence an action in the district court of the proper county against the commission and other interested parties as defendants, to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates, fixed in such order is unlawful or unreasonable, or that any such regulation, practice, or service, fixed in such order, is unlawful or unreasonable. The commission and other parties defendant shall file their answer to said complaint within thirty days after the service thereof, whereupon such action shall be at issue and stand ready for trial upon twenty days' notice to either party.

(2) All actions brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the court shall always be deemed open for the trial thereof, and the same shall be tried and determined as other civil actions; any party to such action may introduce evidence in addition to the transcript of the evidence offered to such commission. Any party in interest being dissatisfied with the order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing or prescribing any rule, regulation, practice, or service, may apply to the district court having jurisdiction, for, and upon proper showing there shall be issued by such court, an injunction, staying and suspending the operation of the order of the commission pending the final determination of the reasonableness and lawfulness of said order in the courts. All orders of the commission shall become operative within twenty days after the filing of the order by the commission subject to the right of stay and injunction as hereinbefore provided. As a condition to the granting of such injunction, the court shall require of the party seeking such injunction an undertaking entered into on the part of the plaintiff, supported by responsible corporate surety, in such reasonable sum as the court shall direct, to the effect that the plaintiff will pay all damages which the opposite party may sustain by reason of the delay or prevention of the order of the commission becoming effective if said order is sustained in the final determination, or in proceedings involving rates the court may in the alternative require the difference between the existing rate and the commission ordered rate to be impounded under the direction of the court, pending the final determination of the action.

(3) If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay

further proceedings in said action for fifteen days from the date of transmission. Upon receipt of such evidence, the commission shall consider the same, and may modify, amend, or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulation, practice, or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

(4) If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify, or amend the same, such altered, modified, or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

(5) Either party to said action, within sixty days after service of a copy of the order or judgment of the court, may appeal or take the case upon error as in other civil actions. Where an appeal is taken to the supreme court of Montana, the cause shall, on the return of the papers to the higher court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar.

(6) In all actions under this act, the burden of proof shall be upon the party attacking or resisting the order of the commission to show that the order is unlawful or unreasonable, as the case may be.